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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PETER BOGERT,

Plaintiff and Appellant,

v.

**STEVEN GOURLEY, DIRECTOR OF
THE DEPARTMENT OF MOTOR
VEHICLES,**

Defendant and Respondent.

A105310

**(Marin County
Super. Ct. No. CVO33672)**

Peter Bogert appeals the judgment denying his petition for writ of administrative mandate (Code Civ. Proc., § 1094.5) by which he sought an order commanding Steven Gourley, Director of the California Department of Motor Vehicles, to set aside the Department's order suspending his driving privileges for two years for driving under the influence. He contends he was improperly admonished by the arresting officer.

BACKGROUND

California Highway Patrol Officer Nicholas Silva, on routine patrol, was dispatched to a single car traffic accident. When he arrived at the scene at 5:45 p.m., appellant was in the driver's seat of the car and was being attended by medical personnel. Officer Silva smelled an alcoholic odor on appellant. Appellant was transported to the hospital in an ambulance. Silva followed in his patrol car.

At the hospital appellant showed signs of intoxication: slurred speech, red eyes, odor of alcohol. Two field sobriety tests were conducted at the hospital: horizontal gaze nystagmus and preliminary alcohol screening device (P.A.S.). According to the horizontal gaze nystagmus test, "Lack of smooth pursuit was present. Onset was present prior to 45 degrees and at the extremes. [Appellant] was [lying] in the hospital bed, but had to be told twice not to turn his head."

Before administering a P.A.S. test, Officer D. Jones admonished appellant: "I am requesting that you take a preliminary alcohol screening test to further assist me in determining whether you are under the influence of alcohol. You may refuse to take this test; however, this is not an implied consent test and if arrested, you will be required to give a sample of your blood, breath, or urine for the purpose of determining the actual alcoholic and drug content of your blood." Officer Jones administered a P.A.S. test at 6:25 p.m.; "[t]he reading was .268 on a weak sample." Appellant refused Jones's attempt to conduct a second P.A.S. test. He told the attending medical staff he did not want to talk to the "cops."

Medical staff had drawn blood from appellant before Silva reached the hospital. They informed him that even though a drop of the alcohol cleaner used to swab the injection site in the direct path of the needle could affect the reading, the blood sample would still provide a "pretty accurate" test for appellant's blood-alcohol concentration. The report of the attending physician states, inter alia, "Evaluation revealed a blood alcohol level of 2.95."

At 6:30 p.m. Officer Silva placed appellant under arrest for driving under the influence. He advised appellant of Vehicle Code section 23612's implied consent condition, by which a driver arrested for driving under the influence is deemed to have consented to blood or breath chemical testing to determine alcohol content in the blood. Appellant replied, "I'm not taking any of your fucking tests." Officer Silva then read appellant the chemical test refusal admonition (Veh. Code, § 13353) from the back of a

Department of Motor Vehicles Form DS367.¹ The admonition advises generally that a driver who is arrested for driving under the influence and refuses to submit to a chemical

¹ Form DS 367 is entitled "AGE 21 AND OLDER OFFICER'S STATEMENT." The back of this form, with Officer Silva's handwritten entries shown in italics, states:

CHEMICAL TEST REFUSAL (13353 CVC)
CHEMICAL TEST ADMONITION (23612 CVC)

I admonished the driver on 05-03-03 at 6[:]/29 AM/PM in Marin Gen Hosp. Marin CA.

1. You are required by state law to submit to a chemical test to determine the alcohol and/or drug content of your blood.

☐ a. Because I believe you are under the influence of alcohol, you have a choice of taking a breath or blood test.

☐ b. Because I believe you are under the influence of alcohol and drugs, you have a choice of taking a breath, blood or urine test.

☐ c. **WHEN APPLICABLE:** Since the breath and blood tests are unavailable, you are deemed to have given your consent to chemical testing _____ of your urine.

☐ d. **WHEN APPLICABLE:** Since you need medical treatment, your choice is limited to _____ test(s), the only test(s) available at _____."

3. If you refuse to submit to, or fail to complete a test, your driving privilege will be suspended for one year or revoked for two or three years. A second offense within seven years of a separate violation of driving under the influence, including such a charge reduced to reckless driving, or vehicular manslaughter, or a violation of Section 23140 CVC, or separate administrative determination that you were driving with a BAC of 0.01% or more while under age 21, or a BAC of 0.08% or more at any age, or you refused a test, will result in a two-year revocation. Three or more offenses within seven years of any combination of the above violations, convictions or separate administrative determinations will result in a three-year revocation.

4. Refusal or failure to complete a test may be used against you in court. Refusal or failure to complete a test will also result in a fine and imprisonment if this arrest results in a conviction of driving under the influence.

5. You do not have the right to talk to an attorney or have an attorney present before stating whether you will submit to a test, before deciding which test to take, or during the test.

6. If you cannot, or state you cannot, complete the test you choose, you must submit to and complete a reaming test.

RESPONSE TO: Will you take a Breath test? No Blood Test? No

☐ **Both Breath and Blood tests are unavailable. EXPLAIN:** _____

test will have his driving privileges suspended or revoked for at least a year. (See pp. 6, 7, *post.*) Silva's reading of the admonition was tape recorded, and he gave appellant a copy of the order temporarily suspending his driver's license for refusing the chemical test.

Appellant requested an administrative hearing before the Department of Motor Vehicles (DMV) concerning the suspension. He argued that "the heart of this case" was the absence of a sworn admonition by Officer Silva that he had advised appellant (1) of appellant's obligation to submit to a blood or breath test, and (2) that because appellant's arrest occurred in the hospital, his test choices were limited to the tests available at the hospital.

The DMV hearing officer found that Officer Silva advised appellant of the chemical test requirement by reading him the chemical test admonition verbatim from Form DS367 and that, based on this admonition, appellant specifically refused to submit to chemical testing. Appellant's driving license was suspended for two years, effective August 7, 2003.

Appellant's subsequent petition for a writ of administrative mandamus reasserted that he was never admonished of his obligation to take a breath or blood test after he was arrested, nor was he advised of the kinds of tests available at the hospital. He based his assertion on the absence of any check marks in the boxes in front of provisions 1, a through d, on Form DS 367 read to him by Officer Silva. (See fn. 1, *ante.*)

The trial court concluded that appellant refused to submit to a chemical test, and that Officer Silva admonished appellant on the requirement to submit and the

☐ **Drug use suspected.**

RESPONSE TO: Will you take a urine test? _____

This driver refused to submit to or failed to complete any test. The refusal or failure was indicated by the following statements or actions: I will not take any of your tests.

If not given in English, admonition was given in ☐ Spanish ☐ Other language (specify)

If the above Chemical Test Admonition was read to arrestee by another officer, indicate that officer's:

consequences of refusal. It based its conclusions on Silva's statements on Form DS367 as to the time and place of his admonitions, and on Silva's notations on Form DS367 as to appellant's response to his admonitions. The trial court observed that there was "some question" as to whether Silva properly admonished appellant. "However, even assuming that a blood test was the only test available [at the hospital], [appellant] refused that test, along with a breath test. Thus, the 'wrong' [admonition] had no impact on [appellant's] refusal since he refused any test."

The trial court then denied appellant's petition and entered judgment for respondent.

DISCUSSION

I. *Standard of Review*

When the trial court rules on an application for a writ of mandate following a DMV order suspending a drivers license, it is required to determine, based on its independent judgment, whether the weight of the evidence supports the administrative decision. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456.) The appellate court reviews the record to determine whether the trial court's findings are supported by substantial evidence. (*Id.* at p. 457.)

II. *Implied Consent and License Suspension Statutes*

If a person is lawfully arrested for driving under the influence of alcohol, he is deemed to have given his consent to chemical testing of his blood, breath or urine to determine the alcoholic content of his blood. (Veh. Code, § 23612, subd. (a)(1)(A).²) The testing shall be incidental to a lawful arrest and administered at the direction of the peace officer who has reasonable cause to believe the driver was driving under the influence. (§ 23612, subd. (a)(1)(C).) The officer shall also tell the driver that his failure to submit to the required chemical testing will result in a fine and suspension or revocation of driving privileges. (§ 23612, subd. (a)(1)(D).)

Name N. Silva **Badge/ID No.** ____ **Agency** ____ **Phone No.** ____

² All further section references are to the Vehicle Code.

A driver lawfully arrested for driving under the influence has a choice of a breath or blood test, and the arresting officer shall inform the driver of that choice. (§ 23612, subd. (a)(2)(A).) If the driver needs medical treatment and is first transported to a medical facility where it is not feasible to administer a particular chemical test, he has the choice of the tests available at that facility. In that case, the officer shall advise the driver of the tests available at the facility and that the driver's choices are limited to those available tests. (§ 23612, subd. (a)(3).)

“A preliminary alcohol screening test that indicates the presence or concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle in violation of [section 23152, driving under the influence] is a field sobriety test” (§ 23612, subd. (h).) An officer may use this test as a further investigative tool. (*Ibid.*) An officer who decides to use a preliminary alcohol screening test shall advise the driver that the officer is requesting the driver to take the preliminary alcohol screening test to assist in determining whether he is under the influence, but the driver's obligation to submit to chemical tests is not satisfied by submitting to a preliminary alcohol screening test. The officer must advise the driver of this fact and that the driver has the right to refuse the preliminary alcohol screening test. (§ 23612, subd. (i).)

If the driver refuses or fails to complete the chemical testing, the peace officer, on behalf of the DMV, shall serve notice of the order suspending driving privileges personally on the arrested driver. The notice shall be on a DMV form. (§ 23612, subd. (e).) The officer shall immediately forward to the DMV a copy of the completed notice of suspension form, plus his required sworn report of all information relevant to the enforcement action. (§§ 13380, 23612, subd. (g)(1).)

When the DMV receives the officer's sworn report that the arrested driver refused to submit to the required chemical tests, it shall review the record. (§ 13353, subd. (c).) Before it may suspend the driver's license for failure to submit to a chemical test pursuant to section 23612, it must make four findings: (1) the officer had reasonable cause to believe the driver was driving under the influence; (2) the driver was arrested;

(3) the driver refused to submit to or complete the chemical test; and (4) the driver was notified that his driving privileges would be suspended if he refused to submit.

(§§ 13353, subd. (c), (1)-(4), 13557, subd. (b)(1), (A)-(D); *Hughey v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 752, 757-758.) If the DMV determines by a preponderance of the evidence that any of these four facts were not proven, it shall rescind the order of suspension. (§ 13557, subd. (b)(1), (A)-(D).)

III. *Evidence of Test Refusal*

Appellant contends there is insufficient evidence that he was properly admonished that he had a choice of a blood or breath test, and that, insofar as he was at the hospital, his choice of test was limited to the tests available at that hospital. Specifically, he reiterates his argument to the trial court that the unchecked boxes preceding provisions 1, a through d, on Form DS367 (see fn. 1, *ante*) manifest a failure by Officer Silva to advise appellant specifically of his choice of test and any limitation on choice because of the hospital setting. We construe appellant's contention as encompassing a contention that, absent proper admonitions, there was insubstantial evidence that he refused to submit to testing.

We disagree and conclude the trial court's findings that appellant was sufficiently admonished and refused to be tested are supported by substantial evidence. Officer Silva's own report for the California Highway Patrol, "Driving under the Influence Arrest--Investigation Report" (commonly referred to as a CHP 202 report), states that Officer Jones gave an admonition regarding the P.A.S, which informed appellant that it was not an implied consent test and, if arrested, he would be required to give a blood, breath or urine sample. Appellant was thus on notice before his arrest that a required chemical test was a consequence of an arrest.

Silva's CHP 202 report also quotes appellant's precise response, after his arrest, to Silva's advisory regarding implied consent: "I'm not taking any of your fucking tests." The reasonable inference from Silva's quoting appellant's vulgar response directly in his report, rather than paraphrasing it in more temperate language, is that Silva wanted to demonstrate the vigor and certainty of appellant's refusal.

Silva further reported in his CHP 202 report that he read the chemical test refusal admonition directly from the back of Form DS367. The fact that the boxes included in the admonition on Form DS367 are not checked does not reasonably imply that Silva did not read the entire admonition to appellant. The remaining information supplied by Silva in the admonition portion of Form DS367 more reasonably implies the contrary. Immediately under the chemical test refusal admonition the reporting officer is asked to note the response of the driver to the questions, “Will you take a Breath test? Blood test?” Silva handwrote “no” after both questions, and then wrote that appellant stated he would “not take any of your tests.” From these notations the court could logically infer that appellant was made aware of the existence of both kinds of tests, and that, no matter what kind of test was available, he rejected them all.

Furthermore, as previously noted, Form DS367 is entitled “AGE 21 AND OLDER OFFICER’S STATEMENT.” On its first page is a certification, executed by Officer Silva under penalty of perjury, that the information contained in the statement is true and correct. In the absence of specific conflicting evidence, as opposed to speculation and conjecture, the trial court was entitled to believe what Silva wrote on Form DS367: he gave the chemical test refusal admonition, as worded on the back page of Form DS367, to appellant on “05-05-03” at “6[:]29” p.m. at Marin General Hospital, and appellant said “no” to taking a breath, blood, or “any” test.

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Stevens, J.

Gemello, J.